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No. 79-926

In the
Supreme Court of the United States
OCTOBER TERM, 1979

JOSE PADILLA,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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INDEX

Subject Index

	PAGE
Judgment and Opinion of the Courts Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	4
I. The Petitioner Was Mentally Deficient To Such An Extent That He Could Not Knowingly And Voluntarily Waive His Self-Incrimination And Right To Counsel Rights. The State Failed To Demonstrate That These Rights Were Knowingly And Intelligently Waived	4
II. The Petitioner's Admissions And All Other Evidence Resulting From His Arrest Should Have Been Excluded Because His Warrantless Arrest Was Based Upon The Uncorroborated Information Supplied By A Citizen	11
Conclusion	17
Appendix	1a
Opinion of Illinois Appellate Court	1a
Order Denying Petition for Leave to Appeal	8a

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Brown v. *Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975) ..	14
Chapman v. *California*, 386 U.S. 18, 87 S.Ct. 824	15
Cooper v. *Griffin*, 455 F.2d 1142 (5th Cir. 1972)	6
Draper v. *United States* (1959), 358 U.S. 307, 79 S. Ct. 329, 3 L.Ed. 327	15
Jurek v. *Estelle*, 593 F.2d 672 (5th Cir. 1979)	10
Miranda v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602	6
People v. *Baker*, 9 Ill. App.3d 654, 292 N.E.2d 760 (1973)	7
People v. *Clay* (1973), 55 Ill.2d 501, 304 N.E.2d 280 ..	16
People v. *Cooper*, 30 Ill. App.3d 326, 332 N.E.2d 453 (1975)	10
United States ex. rel. Saiken v. *Bensinger*, 489 F.2d 865 (7th Cir. 1973)	16
United States v. *Satterfield*, 558 F.2d 655 (2d Cir. 1977)	9
United States v. *Spach*, 518 F.2d 866, 870 (7th Cir. 1975)	16
Wong Sun v. *United States*, 288 F.2d 366 (9th Cir. 1961)	13
Wong Sun v. *United States*, 371 U.S. 471, 83 S.Ct. 407	14

OTHER REFERENCES

Amendment IV, United States Constitution	2
Amendment V, United States Constitution	3
Amendment VI, United States Constitution	3
Chapter 38, Section 107-2, Illinois Revised Statutes	3, 12

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To The Honorable, The Chief Justices And Associate Justices Of The Supreme Court Of The United States

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the Supreme Court of Illinois entered on October 1, 1979, denying his Petition for Leave to Appeal.

JUDGMENT AND OPINIONS OF THE COURTS BELOW

The Judgment of the Circuit Court of Cook County, Illinois, was entered on December 17, 1976, without opinion and is not reported. The opinion of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County was filed on March

22, 1979, and is reported at 70 Ill. App.3d 406, 387 N.E.2d 985. A copy of this opinion is set forth in the Appendix. The order of the Supreme Court of Illinois was entered on October 1, 1979, and is not reported.

JURISDICTION

The order of the Supreme Court of Illinois was entered on October 1, 1979, and the jurisdiction of this Court is invoked pursuant to Title 28, United Sates Code, Section 1257.

QUESTIONS PRESENTED

1. Whether the petitioner was mentally deficient to such an extent that he could not knowingly and voluntarily waive his self-incrimination and right to counsel rights.
2. Whether the State failed to demonstrate that these rights were knowingly and intelligently waived.
3. Whether the petitioner's admissions and all other evidence resulting from his arrest should have been excluded because his warrantless arrest was based upon the uncorroborated information supplied by a citizen.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V, United States Constitution.

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Amendment VI, United States Constitution.

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

STATUTES INVOLVED

Chapter 38, Section 107-2, Illinois Revised Statutes.

> "A peace officer may arrest a person when:
>
> • • •
>
> (c) He has reasonable grounds to believe that the person is committing or has committed an offense."

STATEMENT OF THE CASE

The Petitioner, JOSE PADILLA, was indicted by the Grand Jury of the Circuit Court of Cook County, Illinois, Indictment No. 71-2980, on December 3, 1971. Both counts of the indictment charged him with the crime of murdering Donald Bogseth on August 22, 1971.

On November 10, 1976, he was found guilty of the indictment by the trial judge, sitting wthout a jury. On December 17, 1976, he was sentenced to the penitentiary for a term of not less than thirty (30) years nor more than sixty (60) years.

The opinion filed by the Appellate Court of Illinois contains a sufficient recitation of the facts so that it is not necessary to repeat them here.

REASONS FOR GRANTING THE WRIT

I. The Petitioner Was Mentally Deficient To Such An Extent That He Could Not Knowingly And Voluntarily Waive His Self-Incrimination And Right To Counsel Rights. The State Failed To Demonstrate That These Rights Were Knowingly And Intelligently Waived.

Prior to trial, the petitioner unsuccessfully moved to suppress the oral and written inculpatory statements made by him after being taken into custody.

The evidence presented at the hearing on the motion to suppress showed that the petitioner was 17 years of age at the time of the offense on August 22, 1971 and at the time of his interrogation by Chicago Police Officers and an Assistant State's Attorney on August 29 and 30, 1971 (A.3)[1]. The evidence further showed that he had only completed the third grade in school (A.28), and that he could neither read nor write English (A.12).

School officials testified that the petitioner was tested by the Bureau of Child Study, and it was recommended that he be placed in an educably mentally handicapped (EMH) class which is a special classroom for youngsters unable to achieve at a normal rate of progress (A.28). His school attendance was very sporadic in that in one period of 9 weeks he attended only one and one-half days of classes (A.27); and in another period of 21 weeks, he attended only 18 days (A.29).

The school officials further testified that in 1964, the petitioner was given the Culman Henderson test and had an IQ of 78 while in April, 1965 his IQ was 72 (A.29). The IQ range of educably mentally handicapped persons

[1]. "A" refers to the Abstract of Record filed with the Appellate Court.

is 50 to 80. Tests performed on February 1, 1965 indicated that the petitioner had a verbal IQ of 67, a performance IQ of 82 and a full scale IQ of 72 (A.33). He achieved a grade level of 1.3 on Gray's Oral Reading Test and a grade level of 1.6 on the Standard Primary Reading Achievement Test.

When being questioned by Assistant State's Attorney Levinson as to whether he wanted to talk to him, the petitioner replied: "I guess so . . . I don't have no other choice." (A.39)

At one time while Levinson was talking to the petitioner, the petitioner asked him what he meant by testimony (A.21). After Levinson brought in a court reporter to transcribe the statement of the petitioner, some of the colloquy was as follows:

> "Q. [Levinson] Nobody will ever know about it but yourself, myself and the court reporter here.
> A. [Padilla] Will this all be used against me?
> Q. Yes, it could be used against you and it probably will be used against you in a court of law.
> A. I don't want to say no more." (A.39-40).

Although the police officers advised the petitioner of his rights when he was taken into custody on August 29th (A.14), he was not advised of his rights at the time the written statement was taken of him (A.12).

Based on the foregoing facts relating to the petitioner's deficient mental capacity, it is obvious that the petitioner was incapable of making a knowing and intelligent waiver of his rights, and that the State failed in its burden to show that he knowingly and intelligently waived his self-incrimination privilege and right to counsel.

In *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, this Court stated:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to appointed counsel." 384 U.S. at page 475, 86 S.Ct. at page 1628.

In *Cooper* v. *Griffin*, 455 F.2d 1142 (5th Cir. 1972), the defendants moved to suppress their confessions on the grounds that they were incapable of making a knowing and intelligent waiver of their rights in view of their mental retardation. Their IQ's assertedly ranged from 61 and 67 and their reading comprehension was not above the second or third grade level. In agreeing with the defendants' contentions, the court stated:

> "The Supreme Court has repeatedly emphasized that mental deficiency, age, and lack of familiarity with the criminal process are important factors to be considered in determining whether there has been a waiver of constitutional rights. In Sims v. Georgia, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed. 2d 634 (1967), the Court held that a confession obtained from the defendant Sims was involuntary and inadmissible. The Court acknowledged that Sims had been advised of his right to remain silent but observed that:
>
> > Petitioner had been in the continuous custody of the police for over eight hours and had not been fed at all during that time. He had not been given access to family, friends or counsel at any point. He is an illiterate, with only a third grade education, whose mental capacity is decidedly limited. Under such circumstances the fact that the police may have warned petitioner of his

> > right not to speak is of little significance. 389 U.S. 404, 88 S.Ct. 525.
>
> Similarly, in pre-Miranda cases involving the voluntariness of confessions, *the Supreme Court has emphasized that limited mental ability and unfamiliarity with the criminal process are factors which weigh heavily against the voluntariness of a confession.* See, e.g., Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed. 2d 423 (1967); cf. McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943).
>
> Miranda, of course, holds that a confession obtained without warning the suspect of his rights to remain silent and to the assistance of counsel is not admissible. But the converse of that rule does not automatically follow. *The fact that the requisite warning has been given and a waiver obtained does not bar the courts from scrutinizing the circumstances of the confession to determine whether its admission comports with constitutional guarantees. The requirement of 'knowing and intelligent' waiver implies a rational choice based upon some appreciation of the consequences of the decision.* See Molignaro v. Smith, 5 Cir., 1969, 408 F.2d 795. Here the boys surely had no appreciation of the options before them or of the consequences of their choice. Indeed it is doubtful that they even comprehended all of the words that were read to them. Thus, they could not have made a 'knowing and intelligent' waiver of their rights. Accordingly, the confessions are inadmissible." (Emphasis Added) 455 F.2d at pages 1145-1146.

See also *People* v. *Baker*, 9 Ill. App.3d 654, 292 N.E.2d 760 (1973). At the time of the offense, Baker was 15 years of age. When he was 11 years and four months of age, he had a verbal IQ of 70, a performance IQ of 79, a full-scale IQ of 72 and had derived a grade equivalent of 1.1 on a word recognition portion of a school achievement test. In holding that the trial court's finding that

the defendant did not knowingly and intelligently waive his constitutional rights at the time he was questioned was not against the manifest weight of the evidence, the court stated at page 764:

> "The rules of law which governed the trial judge's decision on the Motion to Suppress have been set forth in considerable decisional detail. In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694, the Supreme Court held that, before questioning, a suspect must be warned of his constitutional rights and, having been so advised, that he may waive those basic constitutional guarantees provided he does so voluntarily, knowingly and intelligently. The Court noted that the mere fact that a written waiver is signed does not, in and of itself, establish a knowing and intelligent waiver. The question of whether or not a confession is free and voluntary depends on the circumstances under which it is taken and no single factor is determinative. (People v. Henderson, 37 Ill.2d 489, 229 N.E.2d 519). The youthful age of a defendant is one of the factors to be taken into consideration on the issue of voluntariness. People v. Cocroft, 37 Ill.2d 19, 225 N.E.2d 16, although youthfulness of a defendant does not automatically render a confession inadmissible if it is otherwise voluntary. (People v. Watts, 101 Ill. App.2d 36, 241 N.E.2d 463). Other considerations weighing on the determination of the issue are the familiarity of the defendant with the English language and his mental capacity. (Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 77). That the defendant is young and of somewhat limited intelligence does not, ipso facto, render a confession involuntary, People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466. The police are not required to conduct a mental examination of the accused with a view to ascertaining his ability to comprehend the rights involved as a prerequisite to accepting a waiver but the warning must be in form which '*** is meaningful advice to the unlettered and unlearned in language which he can knowingly act. *** The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear understandable warning of all his rights.' (Coyote v. United States, 380 F.2d 305 (10th Cir. 1967); People v. Bosveld, 109 Ill. App. 2d 317, 320, 248 N.E.2d 697)."

See also the case of *United States* v. *Satterfield*, 558 F.2d 655 (2d Cir. 1977) wherein the court held that even if the defendant has voluntarily waived his rights for purposes of the Fifth Amendment, he was not shown to have waived his rights to counsel pursuant to the Sixth Amendment.

It is obvious that the petitioner in the case at bar was not aware of the options available to him when he was giving the statements as evidenced by the reply he gave to Assistant State's Attorney Levinson. When Levinson first asked him if he wanted to talk to him, the petitioner replied "I guess so . . . I don't have no other choice." (A.39). From this answer, it is apparent that the petitioner was not aware of his right to remain silent, and that he could refuse to talk to Levinson.

It is also apparent that the petitioner never really understood his rights and the consequences of his actions in discussing his role in the homicide of Donald Bogseth. When Levinson was preparing to take a court reporter's statement from him, the petitioner for the first time began to ask questions relating to the consequences of giving a statement, and when Levinson told him that his statement "could be" and "probably will be used against" him, the petitioner said that he did not want to

say anything else (A.39-40). From this colloquy, it is obvious that for the first time the petitioner was able to comprehend the consequences of his making statements relating to the offense.

These factors plus the fact that the petitioner was an illiterate, being unable to read and write the English language, the fact that he had very little formal schooling, the fact that his IQ range placed him in the category of an educably mentally handicapped person definitely constitute circumstances which show that the petitioner could not, under the totality of circumstances, knowingly and intelligently have waived his rights against self-incrimition and his right to counsel pursuant to the Fifth and Sixth Amendments to the United States Constitution.

In *Jurek* v. *Estelle*, 593 F.2d 672 (5th Cir. 1979), the court stated:

> "To begin with, a person like Jurek, whose verbal intelligence is limited, is less likely to be able to understand his right to remain silent. He may also be unable to insist effectively that that right be observed. For these reasons, the Supreme Court has repeatedly recognized that a confession made by such a person is more likely to be involuntary. See, e.g., Sims v. Georgia, 389 U.S. 404, 407, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967); Culombe v. Connecticut, 367 U.S. 568, 624-625, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); Fikes v. Alabama, 352 U.S. 191, 196, 198 77 S.Ct. 281, 1 L.Ed.2d.246 (1957)." 593 F.2d at page 677.

In the case of *People* v. *Cooper*, 30 Ill. App.3d 326, 332 N.E.2d 453 (1975) relied upon by the Illinois Appellate Court in its opinion, Dr. Reifman, a court psychiatrist, testified that a police officer could communicate with and be understood by the defendant "if the officer was willing to take the time." A Dr. Hartman also testified that on

the basis of the results of a full battery of tests performed upon the defendant, the defendant could read and understand his statement as a whole. However, in the case at bar, no such evidence was presented to rebut the testimony presented by the petitioner in support of his petition to suppress.

The Illinois Appellate Court also relied heavily upon the fact that the trial judge had a chance to evaluate the petitioner's ability to understand and respond to questions as a result of his having testified at the motion to suppress hearing. However, it must be borne in mind that this hearing took place approximately two years after the date that the petitioner had given his statements to the law enforcement officers, and, therefore, this reliance is misplaced because of the remoteness of time between the trial judge's observation and the giving of the statements. Furthermore, most of the questions asked of the petitioner were of a leading nature; and most of his answers consisted of a simple "yes" or "no".

From the foregoing, it is obvious that the prosecution failed in its burden to demonstrate that the petitioner knowingly and intelligently waived his privilege against self-incrimination and the right to counsel.

II. The Petitioner's Admissions And All Other Evidence Resulting From His Arrest Should Have Been Excluded Because His Warrantless Arrest Was Based Upon The Uncorroborated Information Supplied By A Citizen.

The pretrial motion to suppress filed by the petitioner also alleged that he was illegally in custody because he had been arrested without a warrant and without probable cause in violation of his rights pursuant to the Fifth Amendment to the United States Constitution.

When the petitioner was taken into custody and questioned on August 29, 1971, and again on August 30, 1971, no warrant had been issued for his arrest (A.13). Under such circumstances the arrest of the petitioner was valid only if the arresting officers had reasonable grounds to believe that he had committed an offense. See Chapter 38, Section 107-2(c), Illinois Revised Statutes, which provides in part as follows:

> "A peace officer may arrest a person when:
>
> (c) He has reasonable grounds to believe that the person is committing or has committed an offense."

The alleged justification for the warrantless arrest was the uncorroborated information supplied the police on August 29, 1971 by one Fela Lastra, a person of unproven reliability and questionable credibility (A.6)[2]. At the time she gave the information to the police, Miss Lastra, who was 16 years of age, was in the police station with her boyfriend, William Gonzales, also known as King Kong, who was a leader of a street gang called the Latin Kings (A.26) and who had a criminal background which included a charge for murder (A.9). Miss Lastra had never given information to the police on prior occasions that had assisted in the solving of crimes. Other than her statement the police had no other evidence linking the petitioner to the crime in question. Nothing was done to verify what she told the police (A.20).

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[2] It is interesting to note that when called as a witness at the trial, Fela Lastra denied that the petitioner had ever made any statements to her concerning the offense. See pages 58-60 and 64 of Abstract of Record.

The evidence at the motion to suppress hearing showed that the police picked the petitioner up at his home on August 29, 1971 and took him to Area 5 Headquarters for questioning (A.10). The petitioner denied any part in the shooting (A.11). After questioning him, the officers conferred with an Assistant State's Attorney, who advised them to release the petitioner "due to lack of physical evidence." Obviously, the Assistant State's Attorney was of the opinion that there was not reasonable grounds to believe that the petitioner had committed an offense based upon the information furnished them by Miss Lastra, and, therefore, insufficient information to support the issuance of an arrest warrant.

The petitioner was again picked up by the police on August 30th and given a polygraph test at Central Police Headquarters. The police at this time did not have any other information that pointed toward the petitioner (A.13). The purpose of him being taken into custody on August 30th was obviously for the purposes of furthering their investigation and interrogating the petitioner further in the hopes of obtaining a confession. The hopes of the officers were fulfilled, and he did give a written statement (A.8, 12, 13).

After giving a written statement, the petitioner went with the officers to the home of Paul Hernandez and obtained a gun and also went to the home of Rafael Castilla, also known as Cuba (A.8).

The courts have generally held that there is no probable cause for an arrest where the officer makes an arrest except on knowledge or information from an informer who he does not know to be reliable. See *Wong Sun* v. *United States*, 288 F.2d 366 (9th Cir. 1961), reversed in other grounds 371 U.S. 471, 83 S.Ct. 407.

Inasmuch as the petitioner was arrested without a warrant and without probable cause, not only should the trial court have suppressed his admissions and statements, but also the leads and physical evidence obtained as a result thereof. *Brown* v. *Illinois,* 422 U.S. 590, 95 S.Ct. 2254 (1975) and *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, which hold that in custody statements which result from an illegal arrest are not admissible.

Without the petitioner's confession and admissions and the physical evidence and leads obtained therefrom, the prosecution would have been unable to prove the charge in the case at bar. The only evidence that was introduced at the trial which linked the petitioner to the commission of the crime charged in the indictment was his own admissions and leads obtained therefrom.

The State presented six witnesses at the trial in addition to various stipulations. Police Officer Smith's testimony was to the effect that he found the victim, Donald Bogseth, in the south crosswalk of North Avenue at its intersection with St. Louis Avenue at about 2:50 A.M. on August 22, 1971 (A.42-43). There was a stipulation that the cause of death of Bogseth was a bullet wound to his chest (A.42).

Officer Mudry's testimony essentially related to the obtaining of a statement from the petitioner and the evidence and leads acquired as a result of the petitioner's statement (A.43-54). From Padilla the name of Paul Hernandez was learned and the rifle was recovered (A.50). The name of Rafael Castillo (Cuba) was also gotten from the petitioner.

Without the statement of the petitioner, the testimony of the firearms expert, Officer Celovsky, would have been

meaningless inasmuch as the obtaining of the rifle which was the basis of his tests was a direct product of the petitioner's statement (A.54-58).

Fela Lastra's testimony added nothing to the State's case inasmuch as she denied any knowledge of the offense (A.58-60, 64).

The testimony of Alfred Levinson, the former Assistant State's Attorney, was confined solely to the taking of an oral statement from the petitioner and his unsuccesful attempt to take a court reporter statement from him (A.60-64).

Had the petitioner not given a statement, the State would not have been able to call Paul Hernandez as a witness for the reason that the record reflects that the police were aware of his information only as a result of the petitioner's statement.

Therefore, it is apparent that without the admissions of the petitioner, and the evidence obtained as a result of the admissions, the State would only have proved that Donald Bogseth died of a gunshot wound.

Therefore, the improper admission of the petitioner's admissions was not harmless error. *Chapman* v. *California,* 386 U.S. 18, 87 S.Ct. 824.

In its opinion, the Illinois Appellate Court stated that proof of prior reliability or independent corroboration of information is unnecessary when the information is supplied by an ordinary citizen. As authority for this proposition, the lower court cited the case of *Draper* v. *United States,* (1959), 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. However, in *Draper,* the information furnished the arresting officers was given by a paid informer

whose prior information on other occasions had proved to be accurate and reliable.

Likewise, the case of *People* v. *Clay*, (1973) 55 Ill. 2d 501, 304 N.E.2d 280, relied upon by the Appellate Court is not applicable because in the *Clay* case at the time the police received the information supplied by Knox, they already knew the descriptions of the men who had committed the crime. The court in *Clay* also said:

> "What Knox told the officers was corroborated by the description of the men as to age, height and complexion which they had received from witnesses. *This independent corroboration of the information obtained from Knox was sufficient to establish probable cause to arrest the defendant.*" 304 N.E.2d at page 282 (Emphasis Added).

The necessity of corroboration of a private citizen's information to establish probable cause has also been enunciated by the federal courts. In the case of *United States* v. *Spach*, 518 F.2d 866, 870 (7th Cir. 1975), the court stated that the fact that a person is named as the source of information is not alone sufficient grounds upon which to credit an informer but is one factor which may be weighed in determining the sufficiency of an affidavit in support of a search warrant. In the *Spach* case, the court also discussed the necessity of corroboration and concluded that since the FBI had confirmed some of the information supplied by the named informant, credibility was given to the remainder of the information.

See also *United States ex rel. Saiken* v. *Bensinger*, 489 F.2d 865 (7th Cir. 1973) which held that an affidavit for search warrant was defective because it failed to establish the credibility of the named informant.

The Appellate Court in its opinion also stated that "independent corroboration existed to verify the defendant's admissions." However, this independent corroboration consisted of evidence obtained by the police from the petitioner himself as a result of his going to the scene of the murder with them and his taking them to see Hernandez. All of this therefore was the fruit of the illegal arrest of the petitioner and his subsequent admissions which should have been excluded from the trial.

CONCLUSION

Wherefore, for the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois should be granted.

Respectfully submitted,

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APPENDIX

No. 77-1099

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

JOSE PADILLA,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable James E. Strunck, Presiding.

Mr. Presiding Justice Jiganti delivered the opinion of the court:

The defendant, Jose Padilla, was convicted in a trial without a jury of the murder of Donald Bogseth. He was sentenced to 30 to 60 years imprisonment. On appeal, he contends that the court erred in denying his motion to suppress inculpatory statements he made, asserting that the statements resulted from an illegal arrest and were made by him without a knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel. He also argues that the evidence did not prove his guilt beyond a reasonable doubt and that the sentence he received was excessive.

The first issue raised pertains to the legality of the defendant's arrest. He states that the police took him into custody without probable cause, and that all evidence resulting from this arrest, including his statements about the incident, should have been suppressed.

On August 22, 1971, about 2:30 a.m., a sniper shot and killed Bogseth as he walked down North Avenue in Chicago, Illinois. At a hearing on the defendant's motion to suppress evidence relating to his arrest, a police officer testified that one week after the shooting 16 year old Fela Lastra told him that the defendant boasted to her of shooting a man on North Avenue. She told the officer that she had been with the defendant near the

scene of the murder several hours before the shooting and that the defendant showed her a rifle and fired it. Lastra gave the police the defendant's home address. She related this information while at a police station in the company of her boyfriend, William "King Kong" Gonzalez. Gonzalez, a leader of a street gang called the Latin Kings, had been arrested for traffic violations; he had been charged at one time with an unrelated murder. Lastra had never given information to the police before that day; at trial, she denied telling the police anything about Bogseth's death.

The police took the defendant into custody and, after advising him of his constitutional rights, questioned him at a nearby police station about the murder. The defendant's mother was with him at the station. He denied any knowledge of the incident and was released, after agreeing to take a polygraph test the next day. The defendant testified that he was at the station over nine hours. The police contend that he was there only a few hours.

The next day the police again took the defendant into custody. He was given the polygraph test and requestioned about the shooting .He was given the polygraph test and requestioned about the shooting; his mother was also present. This time he made both a written and oral statement about it.

An arrest without a warrant must be based on "probable cause": a reasonable belief that the person being arrested has committed an offense. (Ill. Rev. Stat. 1975, ch. 38, par. 107-2(c).) The defendant argues that Lastra's statements are the only basis upon which the police could believe at the time of his arrest he committed an offense and that Lastra's story is insufficient to create such a belief. He contends that she is a person of unproven reliability, that nothing was done to verify the information she gave and that the police were not in the possession of any other information which would have corroborated what she told them.

The reasonableness of a belief, for probable cause purposes, is measured by the facts of the situation and the practical circumstances of everyday life. (*People* v. *Johnson* (1973), 15 Ill. App. 3d 741, 305 N.E.2d 208.) The police are not required to be legal technicians: the information upon which an arrest is made may be hearsay (*People* v. *Colbert* (1973), 10 Ill. App. 3d 758, 295 N.E.2d 225) and its quantum may be less than is necessary to secure a conviction. (*People* v. *Faulisi* (1977), 51 Ill. App. 3d 529, 366 N.E.2d 1072.) Its trustworthiness is assessed by the character of the informant. In the case of a professional informant, there must be a showing of prior reliability or independent corroboration of his information. (*People* v. *Wilson* (1970), 45 Ill. 2d 581, 262 N.E. 2d 441.) But such proof is unnecessary when the information is supplied by an ordinary citizen. (*Draper* v. *United States* (1959), 358 U.S. 307, 79 S. Ct. 329, 3 L.Ed. 2d 327; *Interest of Williams* (1975), 30 Ill. App. 3d 1025, 333 N.E.2d 674.) A finding by a trial court that probable cause to arrest existed will not be disturbed unless it is manifestly erroneous. *People* v. *Clay* (1973), 55 Ill. 2d 501, 304 N.E.2d 280.

In this case the only information which caused the police to arrest the defendant was the story Fela Lastra told them and her information was enough to create a reasonable belief that the defendant had participated in the murder of Bogseth. The hearsay nature of the information is irrelevant. Considering the information the police already possessed about the murder, Lastra's story could not be ignored. She was an acquaintance of the defendant who furnished information of his admission of participation in the murder the police were investigating and who placed him, with a rifle, in the area where the murder occurred. There is nothing in the record which would change Lastra's status from an ordinary citizen to a police informer necessitating the more stringent evaluation of her story through pre-established reliability or independent corroboration. Her relationship to Gonzalez alone is insufficient to impeach her credibility.

The defendant next contends that the statements he gave the police about the killing were made in contravention of his privilege against self-incrimination and his right to counsel because his deficient mental capacity prevented a knowing and intelligent waiver of these rights.

At the time of his arrest and interrogation, the defendant was 17 years old. At the hearing on the motion to suppress, there was evidence that he had completed only third grade and that he could neither read nor write English; he said that his knowledge of Spanish was minimal. In 1964, a test registered his IQ at 78; in 1965 his IQ was registered at 72. School officials testified that while under their care the defendant was placed in classes for the educably mentally handicapped. The IQ of people who are deemed educably mentally handicapped ranges from 50 to 80. However, testimony also indicated that poor school performance did not always denote low intelligence. One teacher stated that the same person who fails in school may be intelligent in other areas, such as the ways of the street.

When first taken into custody by the police on August 29, 1975, the defendant was told of his constitutional rights through the *Miranda* warnings, including that he possessed a privilege against self-incrimination and a right to counsel. It is unclear whether the defendant was again admonished about these rights on the next day when he gave the police a written statement concerning the incident. At the motion to suppress, the defendant and a police officer testified that he was so warned; however, another officer testified the defendant was not reacquainted with his rights. But this same officer at trial said that the *Miranda* warnings were read to the defendant before he made the written statement. While the written statement was taken, the defendant's mother was present and an interpreter apprised her, in Spanish, of it. The statement was read back to the defendant in English. He said he understood it and he signed it.

The defendant made an oral statement to an Assistant State's Attorney about the incident subsequent to the written one. Immediately before making the oral statement, the defendant was cautioned about his constitutional rights. Afterwards, the Assistant State's Attorney asked him if a court reporter could transcribe the statement, saying "no one will ever know about it but yourself, myself and the court reporter." The defendant asked, "will this all be used against me?" He was told that it could and would probably be used against him in a court of law. The defendant said, "I don't want to say no more;" the interrogation ended.

The State has the burden of proving that a defendant's statements are voluntarily made with knowledge of his constitutional protections. (Ill. Rev. Stat. 1975, ch. 38, par. 114-11.) A trial court need not be convinced beyond a reasonable doubt that a statement was voluntary and a reviewing court will not disturb a finding of voluntariness unless, considering the totality of the circumstances, the finding is contrary to the manifest weight of the evidence. *People* v. *Prim* (1972), 53 Ill. 2d 62, 289 N.E.2d 601.

Although seven or eight year old school records indicate that the defendant may not be of average intelligence, subnormal mentality alone does not render a statement involuntary. (*People* v. *Gonzales* (1974), 22 Ill. App. 3d 83, 316 N.E.2d 800.) In several cases, defendants with mental capacities similar to the defendant's have been held to be able to make knowing and intelligent waivers of their rights. (*See People* v. *Cooper* (1975), 30 Ill. App. 3d 326, 332 N.E.2d 453; *People* v. *White* (1975), 61 Ill. 2d 288, 335 N.E.2d 457.) Here, the judge ruling on the motion to suppress had a chance to evaluate the defendant's ability to understand and respond to questions and that evaluation must be acknowledged as an important factor in the decision that the defendant's mentality did not impair his ability to understand and waive his constitutional rights.

Both statements were made by the defendant in non-threatening situations, after he was cautioned about his constitutional rights. His mother was present at the time he gave the police the written statement and she was made aware of what was going on; her presence is a factor which militates against an intimidating atmosphere. (*See People* v. *McCottrell* (1969), 117 Ill. App. 2d 1, 254 N.E.2d 284.) When the defendant was first taken into custody and questioned, he was told about his constitutional protections concerning police questioning. Although there is some evidence that the police did not repeat the *Miranda* warnings before the defendant made and signed the written statement on the next day, other evidence, including the defendant's own testimony shows that these warnings were given. But even in the event that they were not, the failure to restate *Miranda* warnings before questioning the defendant a second time would not automatically invalidate his statements. (*People* v. *Hill* (1968), 39 Ill. 2d 125, 233 N.E.2d 367.) It is not necessary to repeat the warnings at the beginning of each interrogation if other evidence shows that the defendant was adequately apprised of his constitutional rights, and his waiver of them was freely made. *See People* v. *Hill; People* v. *Rosario* (1972), 4 Ill. App. 3d 642, 281 N.E.2d 714; *People* v. *Henne* (1974), 23 Ill. App. 3d 567, 319 N.E.2d 596.

Finally, before the defendant gave an oral statement to the Assistant State's Attorney about the killing, he was advised of his rights and indicated that he understood their significance by exercising them in refusing to have the statement transcribed. (*People* v. *Johnson* (1969), 112 Ill. App. 2d 148, 251 N.E.2d 393.) The combination of these circumstances shows that the finding that the defendant made a knowing and intelligent relinquishment of his constitutional rights before he made admissions to the police was not contrary to the manifest weight of the evidence.

The defendant argues that he was not convicted beyond a reasonable doubt because there are irreconcilable conflicts in the evidence the State presented against him and because there was no independent corroboration of his confession. The defendant's out-of-work statements only admit that he assisted another person in shooting Bogseth. However, a trial witness, Paul Hernandez, testified that the defendant said he actually shot Bogseth and intended to blame the killing on another person.

This conflict in evidence, the testimony that the defendant shot Bogseth and the defendant's admissions that he helped someone else to shoot Bogseth, does not create a reasonable doubt of his guilt. First, at most, the conflict concerns an evaluation of witness credibility. The evaluation of the credibility of witnesses, the determination of the weight to give testimony and the inferences to draw from the testimony is a function of the trier of fact. On review, the decision of which evidence to believe will not be overturned merely because a conflict in evidence exists. *People* v. *Akis* (1976), 63 Ill. 2d 296, 347 N.E.2d 733.

Second, independent corroboration existed to verify the defendant's admissions. The defendant himself led the police to the rifle used in the killing, showed them the scene of the murder, recreated the shooting and assisted the police in finding some spent gun shells from the rifle nearby. Hernandez's account of the incident, except for the conflict as to who actually pulled the trigger, also corroborates the defendant's statements. That evidence, coupled with the defendant's admissions was sufficient to prove, beyond a reasonable doubt, that the defendant shot Bogseth.

The defendant also contends that the sentence he received, 30 to 60 years imprisonment, is excessive. He alleges that the trial court was "more concerned" with the retribution for the sniper killing than with his possible rehabilitation.

The imposition of a sentence is a matter of judicial discretion and absent an abuse of that discretion, a sentence may not be altered on review. (*People* v. *Perruquet* (1977), 68 Ill. 2d 149, 368 N.E.2d 870.) The defendant does not contend that the trial judge abused his discretion by considering improper factors or ignoring relevant ones in imposing sentence. The essence of his argument is that the trial judge gave more weight to one sentencing factor than another. In such a situation, a reviewing court cannot upset the original sentence. *Perruquet.*

We, therefore, affirm the decision of the circuit court of Cook County.

Affirmed.

LINN and ROMITI, J.J., concur.

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 1, 1979

Mr. Jerome Rotenberg
Attorney at Law
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Chicago, Ill. 60603

In re: People State of Illinois, respondent
vs. Jose Padilla, petitioner

Dear Mr. Rotenberg:

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods
Clerk of the Supreme Court

No. 79-926

Supreme Court, U. S.
FILED
MAR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

JOSE PADILLA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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INDEX

	Page
INTRODUCTION	1
REASONS FOR DENYING THE WRIT OF CERTIORARI	2
THE COURT BELOW PROPERLY CONCLUDED THAT THE STATE HAD ADEQUATELY DEMONSTRATED THE EXISTENCE OF A VALID WAIVER BY THE PETITIONER	2
THE DECISION BELOW REGARDING THE LEGALITY OF THE WARRANTLESS ARREST CONFORMS TO THIS COURT'S DECISIONS MANDATING PROBABLE CAUSE	6
CONCLUSION	8

TABLE OF CASES

	Page
Adams v. *Williams*, 407 U.S. 143, 92 S.Ct. 1921 (1972)	6
Aguilar v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964)	6
Beck v. *Ohio*, 379 U.S. 89, 85 S.Ct. 223 (1964)	7
Brewer v. *Williams*, 430 U.S. 387, 97 S.Ct. 1232(1977)	2
Cooper v. *Griffin*, 455 F.2d 1142 (5th Cir. 1972)	4
Fare v. *Michael C.*, ____ U.S. ____, 99 S.Ct. 2560 (1979)	2, 3
Henry v. *United States*, 361 U.S. 98, 80 S.Ct. 168 (1959)	6
McCray v. *Illinois*, 386 U.S. 300, 87 S.Ct. 1056 (1967)	6
Michigan v. *Mosley*, 432 U.S. 96, 96 S.Ct. 321(1975)	3
Miranda v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)	2, 3
North Carolina v. *Butler*, ____ U.S. ____, 99 S.Ct. 1755 (1979)	2
People v. *Baker*, 292 N.E.2d 760 (4th App. 1973)	5
Spinelli v. *United States*, 393 U.S. 410, 89 S.Ct. 584 (1969)	6
United States v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075 (1971)	6
United States ex rel. Cooper v. *Warden, Illinois State Penitentiary*, 566 F.2d 28 (7th Cir. 1977)	4
United States v. *Satterfield*, 558 F.2d 655 (2nd Cir. 1977)	5
White v. *Finkbinder*, 611 F.2d 186 (7th Cir. 1979)	3
Wong Sun v. *United States*, 371 U.S. 471, 83 S.Ct. 407 (1963)	7

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

INTRODUCTION

The petition for writ of certiorari raises two issues intended to justify review by this Court. The first issue poses the question of potential imposition of quantitatively prescribed intelligence scores as a criterion for the exercise of constitutional rights by claiming that a low intelligence test score precludes a knowing and voluntary waiver of fifth and sixth amendment rights. The

second issue questions the constitutional propriety of utilizing citizen informant information as a basis for probable cause for arrest. The respondent respectfully submits that neither issue constitutes a question of first impression. Furthermore, the decision below conforms to legal principles established by this Court, thus the respondent urges the denial of the instant petition.

REASONS FOR DENYING THE WRIT

THE COURT BELOW PROPERLY CONCLUDED THAT THE STATE HAD ADEQUATELY DEMONSTRATED THE EXISTENCE OF A VALID WAIVER BY THE PETITIONER.

Although the petitioner's first Question Presented relates to the absence of a "knowing and voluntary" waiver of rights, the arguments advanced in the petition speak primarily to the issue of "knowing and intelligent" waiver of rights. (Petition, p. 5) Since the record and the petition do not contain any suggestion of coercion regarding the complained of post-*Miranda* admissions, this response will be limited to the issue of a "knowing and intelligent" waiver of the right to counsel and the right prohibiting compelled self-incrimination. (Cases cited in the petition related to voluntariness of confessions predate the *Miranda* decision and thus lack direct applicability to the facts of this case.)

The *Miranda* advisements, 384 U.S. 436 (1966) exist as a prophylactic devise insuring protection of specifically delineated constitutional rights for persons in accusatorial and prosecutorial stages of criminal proceedings. Subsequent to the formulation of the requirement of these advisements, this Court has had occasion to analyze and interpret the exercise of a waiver as it relates to the admissibility of post-*Miranda* inculpatory statements. *North Carolina* v. *Butler,* ____ U.S. ____, 99 S.Ct. 1755 (1979); *Fare* v. *Michael C.,* ____ U.S. ____, 99 S.Ct. 2560 (1979; *Brewer* v. *Williams,* 430 U.S. 387, 97 S.Ct. 1232 (1977); *Michigan* v. *Mosley,* 432 U.S. 96, 96 S.Ct. 321 (1975). These cases clearly hold that a valid waiver of fifth and sixth amendment rights is possible, *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602 at 475; that a showing of "scrupulously honoring" an accused's right to end interrogation can be evidence of the existence of a subsequent waiver, *Mosley,* 423 U.S. at 104; that a valid waiver can be implicit, *North Carolina* v. *Butler,* 99 S.Ct. at 1757; and that a "totality of circumstances" inquiry establishing the validity of a waiver is adequate even as to juvenile proceedings, *Fare,* 99 S.Ct. at 2572.

The claim alleging invalidity of waiver in the instant case appears to rest on the characterization of the petitioner as "mentally deficient" (Petition, p. 4), thus, seemingly ignoring the "totality of circumstances" type analysis. The respondent suggests that an examination of the empirical data and case law proffered by the petitioner in support of this allegation not only ignores the mandate of "totality of circumstances" review but also fails to support the underlying premise of petitioner's incapacity to knowingly effectuate a waiver. Instead, it appears, the petitioner is requesting this Court's imposition of quantitative guidelines based on intelligence test scores to be used in the determination of one's ability to exercise and/or waive constitutional rights.

The instant petition does not allege circumstances that constitute defects in the administration of the *Miranda* advisements nor violations attendant to the petitioner's request to terminate interrogation. The sole basis for review of the claim of waiver, that of mental deficiency evidenced by intelligence and achievement test scores, has not been recognized as an exclusive factor determining validity of waiver. *White* v. *Finkbinder,* 611 F.2d 186 (7th Cir. 1979); *United States ex rel. Cooper* v. *Warden, Illinois State Penitentiary,* 566 F.2d 28 (7th Cir. 1977). Thus, this claim fails to establish error in the judgment below.

The petitioner was the subject of interrogation on two separate days, August 29 and August 30, 1971. The petitioner, however, was not in custody for this entire period, rather he returned to his home after the first day's investigation. Also, the petitioner was accompanied by a parent during the second day's investigation. Upon discovering the fact that the parent lacked bi-lingual skills, the police provided the interpretive services of a Spanish speaking officer. Each question and answer posed to the petitioner was translated for the benefit of the parent. These factors indicate compliance with due process requirements.

The respondent takes exception to the major thrust of the petitioner's argument in support of "mental deficiency." Test scores have been submitted in order to reach the conclusion that the petitioner was illiterate and that assignment to an educably mentally handicapped curriculum demonstrates proof of inability to comprehend *Miranda* advisements. However, there exist two factors regarding this empirical data which tend to vitiate such conclusions. The first is that the test scores being submitted in proof of the claim represent the evaluation of academic performance for a person in other than his primary language. A test not compensating for secondary language deficiency is guaranteed to be unreliable. The second assumption is that achievement test scores are constant and a person who scores one grade level behind his class in a third grade reading program is incapable of improving that level of performance as part of natural maturation. The respondent submits that the only valid conclusions that can be made regarding the empirical data is that the petitioner appeared to score in the low normal range of the subjects tested and that he had a reading deficiency that may be attributable to cultural bias of the testing device.

The case law used in support of petitioner's claim is readily distinguishable. *Cooper* v. *Griffin,* 455 F.2d 1142 (5th Cir. 1972) addressed the issue of the sufficiency of the response of the State regarding the claims of the petitioners, one of whom

spent the custodial period in extreme pain because of a gunshot wound. In the instant case, the State offered testimony of educational and testing specialists to contradict petitioner's claims of inability to exercise a valid waiver. The case of *United States* v. *Satterfield,* 558 F.2d 655 (1976) indicates that emotional rather than intellectual deficiency precluded a valid waiver. The *Satterfield* court concluded the defendant "was distraught, upset, weeping and obviously out of control," 558 F.2d at 657. *People* v. *Baker,* 292 N.E.2d 760 (4th App. 1973) involved a fifteen year old who was in continuous custody for over two days, and was denied repeated requests for parental contact. The decision rests specifically on the theory that the suppression hearing judge would be in the best position to evaluate petitioner's abilities, a proposition that the instant petitioner rejects. (Petition, p. 11) Therefore, these cases do not support petitioner's claim of error by the court below.

For the forementioned reasons, the respondent urges that the Appellate Court's conclusion that the State had fulfilled its obligation to demonstrate the existence of a waiver which resulted in admissibility of inculpatory statements is correct. When the totality of circumstances analysis is used in determining waiver *vel non,* the record discloses absence of coercive influences, willingness to participate in interrogation and scrupulous honoring of a subsequent request to terminate the interrogation process. These factors combine to require the conclusion of the existence of a valid waiver.

THE DECISION BELOW REGARDING THE LEGALITY OF THE WARRANTLESS ARREST CONFORMS TO THIS COURT'S DECISIONS MANDATING PROBABLE CAUSE.

The petitioner alleges that the use of uncorroborated citizen information as a basis for probable cause of the arrest in the instant case is violative of the Constitution. Consequently, the petitioner claims that inculpatory admissions and evidence uncovered subsequent to the arrest should have been suppressed.

The common law rule that warrantless arrests may be made if police officers have probable cause to believe that a suspect has committed a felony was adopted by this Court in *Henry* v. *United States,* 361 U.S. 98, 80 S.Ct. 168 1959); *McCray* v. *Illinois,* 386 U.S. 300, 87 S.Ct. 1056 (1967). Requisite probable cause is measured by satisfaction of either the two-pronged test of *Aguilar* v. *Texas,* 378 U.S. 108, 84 S.Ct. 1509 (1964) fully explained in *Spinelli* v. *United States,* 393 U.S. 410, 89 S.Ct. 584 (1969); the "substantial basis" test of *United States* v. *Harris,* 403 U.S. 573 (1971) or the "indices of reliability" test examined in *Adams* v. *Williams,* 407 U.S. 143, 92 S.Ct. 1921 (1972).

The status of the person who is the source of information holds the key to determining sufficiency of probable cause. In the instant case, the citizen informant was an acquaintance of the petitioner and provided a detailed account of the petitioner's admission of participation in the crime. These facts were corroborated by the knowledge of the nature of the crime already possessed by the officers. Thus, there is no basis for concluding insufficiency of probable cause in the instant case.

The petitioner notes that the citizen informant's trial testimony disclaimed being the source of damaging information to the police. The abstract also reveals that this witness was

called as a Court's witness (Abs., p. 58) and testified that she had not spoken with the officers about the case, (Abs., p. 59) and furthermore denied making the statement bearing her signature (Abs., p. 60). This subsequent contradiction does not invalidate the criteria that was met at the time the police received the information. For if the facts and circumstances which are within the knowledge of the officer at the time of arrest are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed the crime, there exists probable cause. *Beck* v. *Ohio,* 379 U.S. 89, 85 S.Ct. 223 (1964).

A rule emanating from *Wong Sun* v. *United States,* 288 F.2d 366 (9th Cir. 1961), *reversed in part,* 371 U.S. 471, 83 S.Ct. 407 (1963), although not mentioned in petitioner's brief, has particular applicability to the instant fact. The *Wong Sun* Court concluded that an arrest, absent probable cause, will not preclude admissibility of evidence that is so attenuated that it dissipates any taint. 371 U.S. at 491. The respondent submits that the facts of the instant case, release of the petitioner back to his home and community after the initial period of investigation and his voluntary assistance in locating the murder weapon, are facts clearly paralleling the facts leading to refusal of the Court to render inadmissible evidence against defendant Wong Sun himself. Therefore, even if a court were to view the instant petitioner's claim of illegal arrest as valid, there is an adequate factual basis to find requisite attenuation between the arrest and both inculpatory statements and location of the murder weapon.

CONCLUSION

For the above-mentioned reason, that the issues raised are subject to the previous decisions of this Court and thus do not merit review, the respondent requests that the petition for writ of certiorari to review the judgment of the Supreme Court of Illinois should be denied.

Respectfully submitted,

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